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OBESITY AS AN “IMPAIRMENT” FOR EMPLOYMENT DISCRIMINATION PURPOSES UNDER THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008

SHANNON LIU*

I. INTRODUCTION

America is currently labeled one of the top ten “fattest” countries in the world.¹ The popular media floods society with images of slender celebrities and models through movies, television, and magazines. The more accurate image of American citizens, however, is of people who are labeled as obese and have conditions related to being overweight.² The impact of obesity manifests itself in many ways. Airlines are devising ways to accommodate overweight passengers or, alternatively, are charging them for multiple plane tickets when they cannot fit in one seat.³ Clothing retailers have to provide larger quantities of plus-size clothing and accommodate a variety of fashions for larger individuals.⁴ In the legal realm, plaintiffs have brought and continue to bring lawsuits against fast food companies to recover monetary damages for the effects of fast food on their health and weight.⁵ Plaintiffs have also brought and continue to bring claims alleging discrimination due to obesity.⁶ With over one-third of

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¹ Lauren Streib, *World's Fattest Countries*, FORBES MAGAZINE, Aug. 2, 2007, available at http://www.forbes.com/2007/02/07/worlds-fattest-countries-forbeslifecx_ls_0208worldfat.html.

² *Id.*

³ Michelle Higgins, *Excuse Me, Is This Seat Taken?*, N.Y. TIMES, Feb. 28, 2010, available at <http://www.nytimes.com/2010/02/28/travel/prac28fat.html>.

⁴ Jayne O'Donnell, *More Retailers Offer Fashionable Clothing For Plus-Size Women*, USA TODAY, Jan. 22, 2010, available at http://www.usatoday.com/money/industries/retail/2010-01-21-plus-size-fashion_N.html.

⁵ See, e.g., Marc Santora, *Teenagers' Suit Says McDonald's Made Them Obese*, N.Y. TIMES, Nov. 21, 2002, available at <http://www.nytimes.com/2002/11/21/nyregion/teenagers-suit-says-mcdonald-s-made-them-obese.html>.

⁶ Regina Austin, *Symposium: Super Size Me and the Conundrum of Race/Ethnicity, Gender, and Class for the Contemporary Law-Genre Documentary Filmmaker*, 40 LOY. L.A. L. REV. 687, 690 (2007).

Americans qualifying as obese, litigation regarding obesity can create many societal problems.⁷ The application of obesity in legal disputes has become increasingly more apparent as obesity continues to play a role in many individuals' everyday lives. The question then arises: are obese individuals protected from discrimination based on their obesity, particularly in the workplace? While obese individuals constantly face harmful stereotypes, the law is vague on whether this group of individuals has any protection against discrimination in the workplace as disabled persons.

Congress signed into law the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") on September 25, 2008 with the intention of clarifying and expanding the protections of the Americans with Disabilities Act ("ADA").⁸ The ADA, a federal statute enacted in 1990, guarantees protection from discrimination and access to different accommodations to qualified disabled individuals.⁹ Title I of the ADA covers employment discrimination concerns for individuals with disabilities.¹⁰ To qualify as a disabled individual under the original ADA, an individual needed to have an impairment that caused a substantial limitation on a major life activity, or be regarded as having a protected disability, which some courts interpreted very narrowly.¹¹ This narrow interpretation resulted in a strict burden to overcome that few fact patterns could satisfy, resulting in many verdicts favoring defendant employers.¹² The ADAAA widens the class of qualified individuals by broadening the scope of the original ADA and creating three separate prongs of protection: (1) impairments, interpreted broadly, as the threshold for employment discrimination purposes; (2) a record of substantial limitation on major life activities for reasonable accommodations in the workplace; and, (3) being regarded as having an impairment by one's employer whether the impairment is merely perceived by the employer or actually exists.¹³

The ADA and the ADAAA do not explicitly define impairment, but simply state that the condition must be of a physical or mental nature.¹⁴ However, the amended description of impairment dramatically lowers the ADA's baseline for what constitutes a qualified individual for employment discrimination under the

⁷ Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults*, 1999-2008, 303(3) JAMA 235, 240 (2010), available at <http://jama.ama-assn.org/cgi/content/full/303/3/235>.

⁸ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009).

⁹ 42 U.S.C. §§ 12101-12117 (2006).

¹⁰ *Id.*

¹¹ See, e.g., 42 U.S.C. § 12102; *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002).

¹² See, e.g., 42 U.S.C. § 12112; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 509 (1999).

¹³ ADA Amendments Act § 3.

¹⁴ 42 U.S.C. § 12102; ADA Amendments Act § 3.

federal definition of disability.¹⁵ The ADAAA lowers this baseline by redefining the standards for the three prongs and clarifying some of the ADA's intentions.¹⁶ The ADAAA still, however, does not make the threshold completely clear because it lacks a standardized definition or guideline of impairment for these purposes.¹⁷ The ADA also did not define "substantially limiting" or "major life activities"; the ADAAA describes these terms through a non-exhaustive list of examples, as well as through Congress's recommendations for the ADAAA to change the regulations regarding the terms.¹⁸ However, even with these terms clarified, the ADAAA still leaves room for the interpretation of "disability"; courts can construe impairment, a necessary element to all three prongs, differently unless a consistent definition is adopted.¹⁹

The ADAAA's broad interpretation of impairment—rather than the ADA's narrow interpretation of substantial limitations of major life activities—will likely cause more employment discrimination litigation to arise. Courts may expand the definition of impairment on a case-by-case basis, which in turn will expand the general definition of impairment for employment discrimination purposes. This Note will track the expansion of what conditions qualify as disabilities in the context of employment discrimination by analyzing the origins of the ADA and the complications that arose in discerning congressional intent and the definition of disability. By lowering the requirements for qualification under the ADAAA, the ADAAA makes drastic changes to the variety of individuals considered disabled for employment discrimination purposes.²⁰

This Note will primarily examine the first prong, which focuses on whether the plaintiff has a disability.²¹ The focus of the first prong of the ADAAA, in contrast with the ADA, is significant because satisfying the first prong under the ADAAA automatically deems an individual qualified for employment discrimination protection on the basis of disability.²² Under the ADA, the inquiry would not stop at this point.²³ With differing levels of inquiry between the two acts, litigants may have difficulty predicting how the ADAAA will affect case outcomes. This may be particularly difficult where cases involve a question as to whether the condition rose to the level of impairment. Obesity is a physical condition, but courts have not clearly decided whether this condition is a disability. This Note will discuss whether obesity was defined as an impairment in the past under the ADA and whether obesity will constitute or should constitute an impairment using the ADAAA's new standards for judging disabilities.

¹⁵ *Id.*

¹⁶ ADA Amendments Act §§ 1, 3.

¹⁷ ADA Amendments Act § 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ 42 U.S.C. § 12102 (2006).

II. LEGAL BACKGROUND

A. *The Beginnings of Federal Disability Protection*

Congress created legal protection for individuals with disabilities with the enactment of the Rehabilitation Act of 1973.²⁴ In 1990, Congress enacted the ADA, which adopted many of the same definitions and texts of the Rehabilitation Act, but expanded the breadth of possible protections.²⁵ Congress enacted the ADA to ensure equal opportunity in employment, as well as equal opportunity in other life activities for people with disabilities.²⁶ The ADA sought to prevent employment discrimination against any qualified disabled individuals.²⁷ At the time of enactment, an estimated forty-three million Americans could qualify as disabled under the ADA.²⁸ The ADA did not focus on the concept of disability; rather, the ADA focused on preventing unlawful discrimination to dispel the myth that those with disabilities could not function in the workplace or be productive members of society.²⁹ The ADA and the ADAAA, like the Rehabilitation Act of 1973, only protect individuals defined as having a disability or regarded as having a protected disability.³⁰

Congress recognized that individuals with physical and mental impairments often do not have the ability to fully participate in society because of prejudices or barriers against them, both “societal and institutional” in nature.³¹ The Rehabilitation Act sought to ensure that no qualified disabled individuals would be excluded from any programs or activities “receiving Federal financial assistance” solely due to disability.³² Specifically, the Rehabilitation Act only covered discrimination by public employers.³³ In contrast, the ADA applies to employers with fifteen or more employees, regardless of whether the employer is in the private or public sector.³⁴ The ADA provides that no covered employers can discriminate against qualified disabled individuals with regards to job applications, hiring, promotions, compensation, training, or other terms of employment.³⁵

²⁴ 29 U.S.C. § 701-794 (2006).

²⁵ 42 U.S.C. §§ 12101-12117.

²⁶ 42 U.S.C. § 12101.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 110th Cong. 16 (2007) (statement of Hon. Steny Hoyer, Rep. from State of MD., Maj. Leader, U.S. House of Representatives).

³⁰ SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 35 (2009).

³¹ ADA Amendments Act § 2(a)(2).

³² 29 U.S.C. § 794(a) (2006).

³³ 29 U.S.C. § 794(b).

³⁴ 42 U.S.C. § 12111(5)(A) (2006).

³⁵ 42 U.S.C. § 12112(a).

The ADA defines disability the same way that the Rehabilitation Act defines the term.³⁶ In order to bring a claim for discrimination on account of a disability under the ADA, an individual must show that he: (1) is disabled; (2) is able to perform the job's essential functions; and, (3) has been subjected to adverse employment action due to the disability.³⁷

B. *The ADA and the Three Pronged Approach*

The ADAAA's three elements mirror the three prongs of the ADA in highlighting that each prong identifies a separate way to classify an individual as disabled.³⁸ Under the ADAAA, however, a qualified individual need not meet all three prongs to qualify for protection.³⁹ Rather, each prong targets a different concern or threshold of disability accommodation or protection.⁴⁰ The first prong requires both impairment and substantial limitation on a major life activity and refers strictly to discrimination protection based on an individual's disability.⁴¹ The text of this first prong under the ADAAA is identical to the ADA's first step, but Congress clarified the terms "substantially limits" and "major life activity," which had caused confusion and were often narrowly interpreted by the courts under the original ADA.⁴² The ADAAA states that the Equal Employment Opportunity Commission's ("EEOC") ADA regulations defining "substantially limits" as meaning "significantly restricted" were too strict and did not communicate Congress's intended meaning of these terms.⁴³ In the ADAAA, Congress delineates major life activities in a non-exhaustive list of covered activities, which also includes major bodily functions.⁴⁴ However, the ADAAA still does not define the term "impairment" for the purpose of disability discrimination.⁴⁵

The second prong, which involves qualifications for reasonable accommodations, requires that the individual have a record of an impairment that substantially limits a major life activity.⁴⁶ This targets a smaller population than those who are protected against employment discrimination under the other two prongs. Under the second prong, courts must review the history of an individu-

³⁶ 42 U.S.C. § 12112(2).

³⁷ *Hewitt v. Alcan Aluminum Corp.*, 185 F. Supp. 2d 183, 188 (N.D.N.Y. 2001) (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), within the context of the ADA).

³⁸ 42 U.S.C. § 12112(8); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008) (codified as amended at 42 U.S.C. § 12102 (Supp. II 2008)).

³⁹ ADA Amendments Act § 4(a), 122 Stat. at 3555.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* § 2, 122 Stat. at 3553, § 4(a), at 3555.

⁴³ *Id.* § 2, 122 Stat. at 3553.

⁴⁴ *Id.* § 4(a), 122 Stat. at 3555.

⁴⁵ *Id.* § 4, 122 Stat. at 3555-56.

⁴⁶ *Id.* § 4(a), 122 Stat. at 3555.

al's disability, regardless of whether the individual has undergone any treatment or "ameliorative effects."⁴⁷ For example, an individual with a hearing deficiency would be evaluated without regard to the ameliorative effect of hearing aids.⁴⁸ Courts review the disability regardless of the mitigating measures because those who have found adaptive strategies still have an impairment that may disadvantage them in an employment context.⁴⁹ Use of eyeglasses and contact lenses is the one noted exception regarding mitigating measures; courts will consider these ameliorative devices in determining the impact on a major life activity.⁵⁰ The "reasonable accommodations" prong requires employers to provide adjustments to the workplace that will enable a qualified individual to perform the work required for the employment position.⁵¹ These accommodations might include minor changes, such as an ergonomic chair, or more major changes, such as physical changes to the workspace. Employers are not required to provide reasonable accommodations that would cause the employer an undue burden.⁵²

The third prong, "being regarded as having an impairment," determines the plaintiff's qualification for employment discrimination protections.⁵³ As opposed to the second prong, which examines the record of an impairment for reasonable accommodations, the third prong does not concern reasonable accommodations.⁵⁴ Qualifying solely under the third prong does not legally entitle an individual to reasonable accommodations from employers.⁵⁵ An individual is "regarded as having an impairment" when he demonstrates that the employer engaged in discrimination based on an impairment, regardless of whether the employer perceives that this impairment actually limits a major life activity.⁵⁶ The plaintiff does not need to introduce functional tests to show that the impairment substantially limits a major life activity because the third prong does not require that an individual actually have an impairment as a matter of fact.⁵⁷ Therefore, an individual who is not disabled can qualify for protection under this prong if he can prove that the employer discriminated based on a mistaken perception that the applicant has a protected disability.⁵⁸

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 47 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (statement of Managers); *see also* H.R. REP. NO. 110-730, pt. 1, at 15 (2008).

⁵⁰ ADA Amendments Act § 4(a), 122 Stat. at 3556.

⁵¹ 42 U.S.C. § 12112(b)(5)(A) (2000).

⁵² *Id.*

⁵³ ADA Amendments Act § 4(a), 122 Stat. at 3555.

⁵⁴ *Id.*

⁵⁵ *Id.* § 6(a)(1), 122 Stat. at 3557 (codified as amended at 42 U.S.C. § 12201 (Supp. II 2008)).

⁵⁶ *Id.* § 4(a), 122 Stat. at 3555.

⁵⁷ H.R. REP. NO. 110-730, pt. 2, at 17 (2008).

⁵⁸ ADA Amendments Act § 4(a), 122 Stat. at 3555.

C. Ambiguities in the ADAAA's Expansion of Disability

Both the ADA and the ADAAA define disability as an impairment, physical or mental in nature, that substantially limits at least one major life activity.⁵⁹ However, the original ADA did not define impairment; to remedy the lack of a statutory definition, the EEOC issued several regulations outlining the definition of disability, but these regulations did not address what characteristics impairments entailed.⁶⁰ The EEOC previously defined a physical impairment as any “physiological disorder or condition, cosmetic disfigurement, or anatomical loss” that affects various body systems.⁶¹ The EEOC defined mental impairments as psychological or mental disorders, including: “mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”⁶² Additionally, the EEOC stated that impairments did not include “physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within ‘normal’ range and are not the result of a physiological disorder.”⁶³ The literal language of the regulations suggested that a physical impairment could include obesity caused by a physiological condition or an extreme case of obesity that may not be physiological in nature. The guidelines, however, specifically addressed weight issues stating that obesity can be a disabling impairment only in rare circumstances.⁶⁴ The regulations did not define what constitutes a rare circumstance, but the guidelines listed a few examples of exceptions to the “rare circumstances” qualification, such as pregnancy related obesity, since it is not due to a physiological disorder or condition.⁶⁵

Congress explicitly communicated the hope that the EEOC would revise its regulations defining “substantially limits” as “significantly restricted” to be consistent with the ADAAA’s intentions of broadening the ADA’s application to workplace discrimination.⁶⁶ Congress intended that individuals would fulfill the requirement of “substantially limits” by demonstrating a significant limit when attempting to perform a major life activity.⁶⁷ Under the ADAAA, if an individual has an impairment that substantially limits one major life activity, the impairment need not have an effect on any other activities.⁶⁸

The original ADA’s baseline for disability did not define major life activities

⁵⁹ 42 U.S.C. § 12102(2)(A) (2000); ADA Amendments Act § 4(a), 122 Stat. at 3555.

⁶⁰ 42 U.S.C. §§ 12102–12111; 29 C.F.R. § 1630.2(h)–(j) (2008), *superseded by statute* ADA Amendments Act § 4, 122 Stat. at 3555.

⁶¹ 45 C.F.R. § 84.3(j)(2)(i) (2005).

⁶² 29 C.F.R. § 1630.2(h)(2).

⁶³ *Id.* § 1630 app. at 370.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553 (2008).

⁶⁷ 154 CONG. REC. H8289 (daily ed. Sept. 17, 2008) (statement of Rep. Nadler).

⁶⁸ ADA Amendments Act § 4(a), 122 Stat. at 3555.

or the activities affected.⁶⁹ One of the earlier versions of the ADAAA that was not adopted, the ADA Restoration Act, required only an impairment to qualify for disability and made no mention of substantial limitations on major life activities.⁷⁰ The ADAAA ultimately included the original ADA text for this prong, but clarified major life activities through a non-exhaustive list of qualifying activities that includes "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."⁷¹ Major bodily functions also constitute major life activities.⁷² Major bodily functions include, but are not limited to, "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."⁷³ The EEOC has noted that the list is not comprehensive, and has worked to create guidelines for what activities qualify as major life activities.⁷⁴ Despite having a set of guidelines for what may fall into the category of disability, there are many unclear areas because no bright-line rule exists since disabilities fall into varying gradations.

The ADAAA expanded its definition of major life activities by including covered impairments that are episodic or in remission if the condition is covered when in an active state.⁷⁵ For a condition to be considered an impairment, it must be expected to last or actually last for at least six months.⁷⁶ This requirement, for instance, includes cancer patients treated for at least six months, even if the cancer has gone into remission and symptoms never arise again.⁷⁷ This definition also includes diabetic patients who use insulin to control their blood sugar though there may not be negative impacts or emergencies due to the mitigating effects of insulin shots.⁷⁸ Additionally, when evaluating whether major life activities are affected, the assessment is made by comparing the individual to most people for the specific activity, rather than someone in the same demographic.⁷⁹ Although the ADAAA's expansion of the scope can be readily perceived in its statutory text, the Supreme Court's interpretation of the ADA has heavily limited its interpretation of the ADAAA's scope.

⁶⁹ 42 U.S.C. § 12102-12111 (2000).

⁷⁰ ADA Restoration Act, H.R. 3195, 110th Cong. § 4 (2007).

⁷¹ ADA Amendments Act § 4(a), 122 Stat. at 3555.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 29 C.F.R. app § 1630.2(i) (2008).

⁷⁵ ADA Amendments Act § 4(a), 122 Stat. at 3555.

⁷⁶ *Id.*

⁷⁷ Sandra B. Reiss & J. Trent Scofield, *The New and Expanded Americans with Disabilities Act*, 70 ALA. L. REV. 39, 40 (2009).

⁷⁸ *Id.* at 41.

⁷⁹ H.R. REP. NO. 110-730, pt. 1, at 9-10 (2008).

III. COURT INTERPRETATION

A. Key ADA Supreme Court Cases to Which the ADAAA Responded

The ADAAA makes significant changes, which explicitly overrule U.S. Supreme Court cases that limited the scope of individuals covered under the ADA by interpreting “disability” narrowly.⁸⁰ Most notably, the ADAAA explicitly rejects the holdings of *Sutton v. United Airlines* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.⁸¹ Another Supreme Court case, *Murphy v. United Parcel Service*, also highlights how the original ADA’s determination of disability was too narrow in scope.⁸²

Sutton declined to find two sisters with poor eyesight disabled under the ADA because they could use mitigating measures, in the form of corrective eyeglasses, to perform their duties with normal eyesight.⁸³ Though the ADAAA considers the ameliorative effects of regular eyeglasses in determining disability, *Sutton* represented the narrow view of disability as depending on whether the plaintiff could perform as if she had no disability once all circumstances were taken into account.⁸⁴ The ADAAA now includes a provision explicitly outlawing the consideration of the compensatory effects of mitigating measures in determining the impact on major life activities; this provision was Congress’s response to the *Sutton* court’s decision.⁸⁵

Toyota defined “substantially limits” as “to prevent or severely restrict,”⁸⁶ a stricter standard for protection under the ADA than Congress intended when it enacted the ADA in 1990. The *Toyota* case also considered a “substantially limiting” condition to require either a permanent or long-term impact by the impairment.⁸⁷ The ADAAA creates a broader definition of substantial limitation and explicitly states that impairments must be expected to last or actually last for six months or longer, such that transitory and minor impairments are not covered.⁸⁸ By explicitly referring to *Sutton* and *Toyota* in the text of the ADAAA’s goals, Congress guaranteed that these cases would no longer be considered good law in determining disability.⁸⁹

In *Murphy*, the United Parcel Service (“UPS”) granted Murphy certification to work despite his high blood pressure.⁹⁰ The Department of Transportation had specific health requirements for UPS drivers, which included a maximum

⁸⁰ ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2, 122 Stat. 3553 (2008).

⁸¹ *Id.*

⁸² BAGENSTOS, *supra* note 30, at 35.

⁸³ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 509 (1999).

⁸⁴ ADA Amendments Act § 4.

⁸⁵ *Id.*

⁸⁶ *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002).

⁸⁷ *Id.* at 198.

⁸⁸ ADA Amendments Act § 4.

⁸⁹ *Id.* § 2.

⁹⁰ *Murphy v. United Parcel Serv.*, 527 U.S. 516, 519 (1999).

blood pressure regulation.⁹¹ UPS later fired Murphy because his blood pressure was too high.⁹² Murphy was unable to demonstrate: (1) that UPS discriminated against him due to a disability that UPS regarded him as having, and (2) that he was unable to perform a class of jobs, rather than just one specific kind of job, due to a disability.⁹³ Despite considering work as a major life activity, the Supreme Court found that Murphy was not substantially limited from work.⁹⁴ Consequently, the Court found that Murphy was not disabled under the ADA.⁹⁵

These three cases highlight that through different interpretations of the ADA's provisions, different groups were excluded from its protections.⁹⁶ Congress introduced the more liberal ADAAA after these three cases to promote its original intent of protecting a larger class of individuals.⁹⁷ *Sutton* and *Toyota* led lower courts to incorrectly decide that many people with substantially limiting impairments did not qualify as disabled, a problem that Congress attempted to address with specific text targeting the previous areas that left room for faulty interpretations.⁹⁸

B. Supreme Court's Explicit Following of *Arline*

The ADAAA explicitly follows *School Board of Nassau County v. Arline* in determining what qualifies as a disability under the ADA, although *Arline* interprets the term handicap under the Rehabilitation Act.⁹⁹ In this case, the complainant had contagious tuberculosis and both the Court of Appeals and the Supreme Court found her handicapped. *Arline* held that "handicap" should be broadly interpreted under the Rehabilitation Act.¹⁰⁰ *Arline* was decided in 1987, before the ADA's enactment. The ADAAA specifically mentioned *Arline* in its determination of how broad the definition of disability should be interpreted in order to protect a larger population.¹⁰¹

C. Cases After the ADAAA's Enactment

The ADAAA seeks to instill Congress's original intent of the ADA and change, as well as clarify, the definitions of many ADA terms.¹⁰² Congress

⁹¹ *Id.* at 519.

⁹² *Id.* at 518.

⁹³ *Id.* at 525.

⁹⁴ *Id.* at 523-24.

⁹⁵ *Id.* at 525.

⁹⁶ See generally *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *Murphy*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

⁹⁷ See generally *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *Murphy*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

⁹⁸ ADA Amendments Act § 2.

⁹⁹ *Id.*

¹⁰⁰ *School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 317 (1987).

¹⁰¹ ADA Amendments Act § 2.

¹⁰² *Id.*

admitted that it expected courts to interpret the original ADA differently than they did in cases regarding the disability protections.¹⁰³ Even though Congress enacted the ADAAA to rectify any differences between the intent and impact of the ADA, the ADAAA does not appear to protect individuals retroactively and only affects matters starting January 1, 2009.¹⁰⁴ Many circuits have held that the ADAAA will not apply to conduct occurring before its enactment because the ADAAA alters duties and liabilities, and interpreting conduct performed before the Act with new standards is unfair to employers.¹⁰⁵ While most circuits have explicitly ruled that the ADAAA does not apply retroactively, the Ninth Circuit in *Rohr v. Salt River Project Agric. Improvement* declined to follow that line of decisions, noting that the ADA's original intent affirmed its conclusions without needing the ADAAA provisions.¹⁰⁶

IV. EEOC'S RESPONSE AND INTERPRETATION

The EEOC, an independent federal agency, has the statutory goal of ending employment discrimination.¹⁰⁷ The EEOC targets employment discrimination by investigating charges and litigating meritorious claims when discriminatory actions take place.¹⁰⁸ For the EEOC to litigate a case, a complainant must file a claim, which the EEOC then investigates. If the EEOC deems the claim meritorious, the EEOC first attempts to settle the case.¹⁰⁹ If the case does not settle, the EEOC can file a lawsuit in federal district court to protect the complainant.¹¹⁰

The EEOC also provides technical assistance and guidance to employers to prevent workplace discrimination.¹¹¹ With regards to statutes like the ADA, the EEOC has released guidelines and regulations providing information on how to interpret specific terms.¹¹² The EEOC has expressly voted and agreed to revise its regulations to conform to changes made through the ADAAA.¹¹³ These regulations focus on "putting [the protections] back to where Congress

¹⁰³ *Id.*

¹⁰⁴ *Id.* at § 9.

¹⁰⁵ See, e.g., *Durham v. McDonald's Rests. of Okla., Inc.*, 325 Fed. Appx. 694 (10th Cir. 2009); *EEOC v. Argo Distrib., L.L.C.*, 555 F.3d 462, 469 (5th Cir. 2009).

¹⁰⁶ *Rohr v. Salt River Project Agric. Improvement*, 555 F.3d 850, 861-62 (9th Cir. 2009).

¹⁰⁷ EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, About EEOC, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Dec. 26, 2010).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 29 C.F.R. § 1630.2 (2008).

¹¹³ EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Commission Votes To Revise Rules To Conform To ADA Amendments Act, June 17, 2009, <http://www.eeoc.gov/eeoc/newsroom/release/6-17-09.cfm>.

intended when the ADA was enacted in 1990.”¹¹⁴ On September 16, 2009, the EEOC approved a notice of proposed rulemaking to revise its regulations that would allow individuals bringing claims under the ADA to establish they had a disability under the “original, expansive intent of Congress when it enacted the ADA.”¹¹⁵ The notice of public rulemaking highlighted that disability should be interpreted broadly without requiring extensive analysis.¹¹⁶ The EEOC’s broad interpretation of disability which reaffirms Congress’s intent for disability protection demonstrates the EEOC’s goal to protect a wider class of individuals to a larger extent.¹¹⁷

The EEOC has argued that morbid obesity is a disability.¹¹⁸ It has also fought for the protection of morbidly obese individuals when employers perceive that they are disabled and treat them as such.¹¹⁹ In terms of specifically addressing obesity within the EEOC’s ADA guidelines, the EEOC has previously stated that obesity is usually not considered a disability.¹²⁰ However, morbidly obese claimants may have an easier time arguing for disability protections than individuals who are mildly or moderately obese. The distinction between morbidly obese individuals and those who are less obese seems to be integral because EEOC guidelines previously suggested that obesity was rarely a disability.¹²¹

In enacting the ADAAA, however, Congress argued that the EEOC’s ADA regulations expressed too high of a standard and that some parts were inconsistent with congressional intent.¹²² Consequently, Congress expressed its expectation that the EEOC revise the portion of its regulation that defines “substantially limits” to be consistent with the ADAAA, giving it the authority to do so.¹²³ The EEOC agreed to revise the regulations and currently revisions are being made.¹²⁴

¹¹⁴ *Id.*

¹¹⁵ EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Commission Approves Proposed ADA Regulations for Public Comment, Sept. 16, 2009, <http://www.eeoc.gov/eeoc/newsroom/release/9-16-09f.cfm>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Brief for EEOC as Amicus Curiae Supporting Plaintiff at 18, *Cook v. Rhode Island, Dep’t of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993) (No. 93-1093).

¹¹⁹ *EEOC v. Texas Bus Lines*, 923 F. Supp. 965, 979 (S.D. Tex. 1996).

¹²⁰ 29 C.F.R. § 1630 at 369 (2008).

¹²¹ 29 C.F.R. § 1630.2(j) (1998).

¹²² ADA Amendments Act § 2.

¹²³ *Id.*

¹²⁴ EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Commission Votes to Revise Rules to Conform to ADA Amendments Act*, June 17, 2009, <http://www.eeoc.gov/eeoc/newsroom/release/6-17-09.cfm>.

V. OBESITY IN AMERICA

Obesity and the problems associated with being overweight are familiar to many Americans. Over two-thirds of the American adult population is considered overweight and over one-third is considered obese.¹²⁵ Not only does obesity affect the health of millions of Americans, but it also affects employers' choices and workplace management.¹²⁶ Often, employers may view obese employees or applicants as lacking self-control; the perception is that these individuals have become overweight due to voluntary actions and behavior.¹²⁷ Additionally, employers may assume that obese employees will create tension in the workplace because obese individuals may have an increased number of sick days or may file more disability claims.¹²⁸

On the other hand, employers face higher financial burdens when employing obese individuals because of higher health insurance premiums, increased pharmaceutical expenses, and other additional costs.¹²⁹ In fact, matters involving obese individuals account for roughly ten percent of medical spending or up to \$147 billion per year.¹³⁰ Obese individuals pay \$1,429 or 42% more in health care costs than normal-weight individuals on average per year.¹³¹ Private insurers typically pay \$1,140 more for obese individuals per year than normal-weight individuals.¹³² These extra employee benefit considerations are important to employers, especially in times of financial difficulty, but employee benefits plans cannot be the basis for an employment decision or discrimination under the Employee Retirement Income Security Act.¹³³ Employment discrimination in obesity cases typically occurs in hiring decisions, amount of wages paid, job placement, and transfer and promotion decisions.¹³⁴ This serves as a reminder that discrimination in the workplace can occur long after an individual starts working and that discrimination is not permissible at any point during the employment process.

The ADA does not name obesity as a disability, perhaps demonstrating that

¹²⁵ Flegal et al., *supra* note 7, at 238.

¹²⁶ Robert C. Klesges et al., *The Effect of Applicant's Health Status and Qualifications on Simulated Hiring Decisions*, 14 INT'L J. OF OBESITY 527, 528 (1989).

¹²⁷ Elizabeth Theran, "Free to be Arbitrary and . . . Capricious:" *Weight-based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J. L. & PUB. POL'Y 113, 157 (2001).

¹²⁸ Samuel Klein et al., *AGA Technical Review on Obesity*, 123 GASTROENTEROLOGY 882, 893 (2002).

¹²⁹ Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 65 (1997).

¹³⁰ Eric A. Finkelstein et al., *Annual Medical Spending Attributable To Obesity: Payer-And Service-Specific Estimates*, Health Affairs 28(5): w822 (2009).

¹³¹ *Id.* at w826.

¹³² *Id.* at w827.

¹³³ 29 U.S.C. § 1140 (2006).

¹³⁴ Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CALIF. L. REV. 57, 62 (2002).

Congress did not view obesity as a specifically protected disability.¹³⁵ The ADA's treatment of obesity, however, does not indicate that obesity must be a neutral physical condition in the workplace. Obesity rates have steadily increased for all genders, ages, ethnic groups, educational levels, and smoking levels.¹³⁶ From 1960 to 2006, obesity increased from affecting 13.4% to 35.1% of American adults from age twenty to seventy-four.¹³⁷ As this age group constitutes the majority of working Americans, this statistic is relevant to the composition of the workforce.

Currently, Michigan is the only state to have an anti-discrimination law based on weight.¹³⁸ Santa Cruz, California and San Francisco, California have enacted local ordinances prohibiting discrimination based on weight.¹³⁹ The District of Columbia has an ordinance that prohibits discrimination based on personal appearance.¹⁴⁰ Other than these four regulations, there are none that speak to prohibiting discrimination against individuals based on their weight or physical size. These regulations demonstrate that there is merit in protecting the right to work for individuals based on their weight, which is correlated with obesity.

Being obese and being overweight are defined as having a weight that is "greater than what is generally considered healthy for a given height" and "increase[s] the likelihood of certain diseases and other health problems."¹⁴¹ Obesity is calculated with regard to one's Body Mass Index (BMI).¹⁴² Obesity has three different gradations: mildly obese, moderately obese, and morbidly obese.¹⁴³ A person falls into the mildly obese category when he or she weighs twenty to forty percent over the normal body weight for that person's size and height.¹⁴⁴ Moderate obesity occurs when a person weighs forty-one to one-

¹³⁵ 42 U.S.C. § 12101(a)(1) (2000).

¹³⁶ Ali H. Mokdad et al., *Prevalence of Obesity, Diabetes, and Obesity-related Health Risk Factors*, 2001, 289(1) J. OF THE AM. MED. ASS'N. 76, 78 (2003).

¹³⁷ NATIONAL CENTER FOR HEALTH STATISTICS, *Prevalence of Overweight, Obesity and Extreme Obesity Among Adults: United States, Trends 1976–80 through 2005–2006*, http://www.cdc.gov/nchs/data/hestat/overweight/overweight_adult.htm (last visited Dec. 26, 2010).

¹³⁸ MICH. COMP. LAWS ANN. § 37.2202(1)(a) (West 2001).

¹³⁹ SANTA CRUZ, CAL., MUN. CODE § 9.83.010 (2004); S.F., CAL., ADMIN. CODE ch.12 B-C (2000), available at www.municode.com/Resources/gateway.asp?pid=14131&sid=5.

¹⁴⁰ D.C. CODE ANN. § 2-1402.11 (2001).

¹⁴¹ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Overweight and Obesity: Defining Overweight and Obesity*, <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited Dec. 21, 2010).

¹⁴² *Id.*

¹⁴³ THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (Robert Berkow et al., eds., 16th ed. 1992).

¹⁴⁴ *Id.*

hundred percent more than the normal body weight.¹⁴⁵ A morbidly obese individual weighs more than one-hundred percent over the normal body weight.¹⁴⁶

Obesity can be a chronic illness rather than just a condition brought on by those who lack will power.¹⁴⁷ The causes of obesity are not always clear, but obesity can be due to a combination of different factors, including “behavior, environment, and genetic” variables.¹⁴⁸ Studies correlate obesity with lower levels of education and lower incomes, among other employment related measures.¹⁴⁹ It is unclear whether these deficits in education and income are caused by feeling discriminated rather than by an actual weight-based debilitation.¹⁵⁰ There is also evidence of genetic ties and correlations in obesity, as demonstrated by studies comparing twins reared separately.¹⁵¹ Some studies show that genetics could account for forty to seventy percent of the difference in body mass.¹⁵²

With higher caloric intake, people are more prone to gaining weight;¹⁵³ this increase in caloric intake can be attributed to eating out more often, having larger serving sizes, and more food variety.¹⁵⁴ Additionally, technological advances have led to decreases in physical activity.¹⁵⁵ Consequently, having increased caloric intake and decreased physical activity are factors for growing numbers of obese individuals in America, though genetic causes also exist.

Side effects of obesity depend on the severity of the individual’s obesity and include conditions such as cardiovascular disease, diabetes, and some forms of cancer.¹⁵⁶ Obesity not only has adverse health effects on its own, but it is also linked to other serious medical illnesses.¹⁵⁷ Although many assume that obese people have serious health problems, this generalization does not apply to everyone.¹⁵⁸ There is also a significantly increased mortality rate for obese indi-

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Klein et al., *supra* note 128, at 904.

¹⁴⁸ CENTERS FOR DISEASE CONTROL AND PREVENTION, Causes and Consequences, <http://www.cdc.gov/obesity/causes/index.html> (last visited Dec. 21, 2010).

¹⁴⁹ See, e.g., Steven Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENGL. J. MED. 1008, 1010 (1993).

¹⁵⁰ *Id.*

¹⁵¹ Albert J. Stunkard et al., *The Body-Mass Index of Twins Who Have Been Reared Apart*, 322 THE NEW ENGLAND J. OF MED., 1483 (1990).

¹⁵² Alfredo Alonso-Ortega et al., *Genetic Influences on Adult BMI Followed Over 29 Years and Their Effects on Late Life Mobility: A Study of Twin Sisters*, 63 J. EPIDEMIOL. COMMUNITY HEALTH 651, 652 (2009).

¹⁵³ Lisa J. Harnack et al., *Temporal Trends in Energy Intake in the United States: An Ecologic Perspective*, 71 AM. J. CLINICAL NUTRITION 1478, 1482 (2000).

¹⁵⁴ Klein et al., *supra* note 128, at 885.

¹⁵⁵ *Id.*

¹⁵⁶ BLACK’S MED. DICTIONARY 442 (Gordon Macpherson ed., 40th ed. 2004).

¹⁵⁷ Klein et al., *supra* note 128, at 882.

¹⁵⁸ Korn, *supra* note 129, at 38

viduals in comparison to normal weight individuals, particularly due to cardiovascular disease.¹⁵⁹ It is estimated that 300,000 Americans die of obesity related causes annually.¹⁶⁰ Morbidly obese individuals may be able to lose weight, though a majority of them will regain the weight that they previously lost.¹⁶¹ This can be attributed to “yo-yo” dieting, which can have the same negative effects as obesity.¹⁶² The difficulty in maintaining a healthy weight could be due to decreased levels of metabolism, making it more difficult to lose weight.¹⁶³

VI. OBESITY IN THE COURTS

Plaintiffs have alleged employment discrimination based on an individual's obesity using both the Rehabilitation Act and the ADA. With the recent enactment of the ADAAA in 2009, however, there is no precedent under the new standard. Obesity discrimination in employment cases has been interpreted very differently by courts in the past, highlighting the lack of a consistent view of whether obesity qualifies as a disability and what inquiry is appropriate.

One well-known employment discrimination case, *Cook v. Rhode Island*, invoked the Rehabilitation Act rather than the ADA.¹⁶⁴ Though the Rehabilitation Act targets only public employers, its definition of “disability” is identical to that of the ADA.¹⁶⁵ Cook worked at the Department of Mental Health, Retardation, and Hospitals (“MHRH”) twice in the past and voluntarily left her position without problems on her record.¹⁶⁶ She applied for the same position in 1988; following a physical examination, MHRH determined that she was morbidly obese, but noted that obesity would not limit her ability to perform the relevant job functions.¹⁶⁷ MHRH did not choose her for the position and concluded that her obesity compromised her ability to assist patients in emergency situations and also increased her risk of developing serious ailments.¹⁶⁸ During her previous work at MHRH, MHRH considered her to be overweight, but it was not until her reapplication that MHRH designated her as morbidly

¹⁵⁹ Flegal et al., *supra* note 7, at 2033.

¹⁶⁰ David B. Allison et al., *Annual Deaths Attributable to Obesity in the United States*, 282 J. OF THE AM. MED. ASS'N 1530 (1999).

¹⁶¹ Christine L. Kuss, Comment, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under the Americans With Disabilities Act*, 12 J. CONTEMP. HEALTH L. & POL'Y, 563, 595-96 (1996).

¹⁶² *Id.* at 596.

¹⁶³ *Id.*

¹⁶⁴ *Cook v. Rhode Island Dep't of Mental Health, Retardation, and Hospitals*, 10 F.3d 17 (1st Cir. 1993).

¹⁶⁵ 29 U.S.C. §§ 701-794 (2001).

¹⁶⁶ *Cook*, 10 F.3d at 20.

¹⁶⁷ *Id.* at 20-21.

¹⁶⁸ *Id.* at 21.

obese.¹⁶⁹ Furthermore, the plaintiff presented evidence that “metabolic dysfunction, which leads to weight gain in the morbidly obese, lingers even after weight loss.”¹⁷⁰ The court analyzed the reasons for rejecting her application based on her designation as morbidly obese by analyzing facts specific to the case.¹⁷¹

MHRH asserted that Cook’s obesity was voluntary, thus barring her from a claim under the Rehabilitation Act.¹⁷² The court, however, noted that the Rehabilitation Act made no reference to the origin of one’s impairment. The Act also covered some conditions that can be voluntarily contracted.¹⁷³ The jury determined that MHRH’s perception of Cook’s impairment would foreclose a large range of jobs and serve as proof that substantial limitation existed.¹⁷⁴ This standard essentially fulfills the requirement that one’s impairment substantially limits a major life activity, which would be the ability to work in this case. Consequently, the court returned a verdict in favor of Cook, finding that MHRH violated the Rehabilitation Act.¹⁷⁵

EEOC v. Watkins Motor Lines involved Stephen Grindle, who weighed 345 pounds when he began working for Watkins and thereafter had weight fluctuations between 340 to 450 pounds for no known physiological reason.¹⁷⁶ While on the job, Grindle fell off a ladder and injured his knee, causing him to take a leave of absence from work for two months following the incident.¹⁷⁷ Watkins had a policy that employees who took a leave of absence for over 180 days would be terminated and those employees could only return to work with a doctor’s release and possible physical examination.¹⁷⁸ Before the 180-day period was over, Grindle turned in a doctor’s release, but Watkins did not reinstate his employment because the doctor had not reviewed Grindle’s job demands.¹⁷⁹ The doctor failed to respond to the list of job demands.¹⁸⁰

Watkins requested that Grindle receive a physical examination, the results of which found that “the most notable item [was] that the patient weigh[ed] 405 lbs,” and that Grindle could not “safely perform the requirements of his job.”¹⁸¹ Grindle’s inability to safely perform his job duties and his doctor’s failure to return the work-release form led Watkins to terminate Grindle after the 180-day

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 24.

¹⁷¹ *Id.* at 23.

¹⁷² *Id.* at 24.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 31.

¹⁷⁶ *EEOC v. Watkins Motor Lines*, 463 F.3d 436, 438 (6th Cir. 2006).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 439.

¹⁸¹ *Id.*

time period had elapsed.¹⁸² Both the district court and the appellate court found that morbid obesity could only be an impairment under the ADA if it was based on a physiological cause, which Grindle did not show.¹⁸³ Because the ADA does not specifically cover this disability, Grindle, as well as any plaintiff alleging weight discrimination, would have to present evidence showing that his specific incident warranted disability determination in order to prevail.¹⁸⁴

Coleman v. Georgia Power involved a plaintiff who sued his employer for discrimination based on obesity that was complicated by back and knee injuries.¹⁸⁵ Georgia Power required employees with certain responsibilities to weigh less than 280 pounds.¹⁸⁶ Should a covered employee exceed the weight maximum, he or she would have one opportunity to enroll in an individualized weight reduction program, which the company funded.¹⁸⁷ Failure to stay under the maximum weight after the weight loss program would result in demotion under the policy as it stood when Coleman was employed or possible demotion or termination after the policy was amended.¹⁸⁸ After successfully completing this program, but subsequently regaining the weight he had lost, Coleman was terminated for weighing more than 280 pounds.¹⁸⁹ The issue before the court was whether Coleman could be disabled under the ADA.¹⁹⁰ Coleman alleged that he satisfied the disability elements of each ADA prong.¹⁹¹ His doctor suggested that obesity could lead to health issues, including diabetes, hypertension, or acute cardiovascular problems like stroke or heart attack.¹⁹² The court found that though not commonly considered an impairment, obesity could be an impairment if "shown both to affect one of the bodily systems outlined in the guideline definition for physical impairment and . . . [if it] is related to a physiological disorder."¹⁹³ Here, however, the court held that there was no physiological link, and thus the plaintiff was not disabled under the ADA.¹⁹⁴

Francis v. City of Meriden involved a firefighter for the City of Meriden, which "entered into a collective bargaining agreement" in 1990 with a firefighters' union.¹⁹⁵ The union set a weight requirement correlated with one's height; failure to meet the weight requirement meant that the employee would have to

¹⁸² *Id.*

¹⁸³ *Id.* at 441.

¹⁸⁴ *Id.* at 440-43.

¹⁸⁵ *Coleman v. Georgia Power Co.*, 81 F. Supp. 2d 1365, 1365 (N.D. Ga. 2000).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1367.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1368.

¹⁹² *Id.* at 1369.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1370.

¹⁹⁵ *Francis v. City of Meriden*, 129 F.3d 281, 282 (2d Cir. 1997).

pass either a body fat or physical fitness test or face discipline.¹⁹⁶ Francis repeatedly failed to meet the weight requirement and also refused to take the body fat and physical fitness tests, leading to his suspension for one day without pay.¹⁹⁷ Francis sued, alleging that Meriden discriminated against him due to the “perception that he had a disability.”¹⁹⁸ The ADA covers situations in which there is “discrimination against those whom an employer perceives, even mistakenly, to have a disability.”¹⁹⁹ To qualify under this “regarded as” prong of the ADA, plaintiffs must show that the disability their employer perceived would be covered under the ADA if they had the disability.²⁰⁰ This court also held that obesity is not considered a physical impairment, unless there are special circumstances such as the obesity having a physiological basis.²⁰¹ Plaintiff here did not fall into that special case.²⁰²

Morrow v. City of Jacksonville concerned a female plaintiff who worked for the police department as a patrol-person and later a juvenile officer.²⁰³ The police department initially required an untimed physical test, which the plaintiff always passed; later, the department adopted a physical test that required employees to complete an obstacle course under timed conditions.²⁰⁴ Morrow failed three attempts at the obstacle course and the Chief of Police suspended her for thirty days and threatened her with termination.²⁰⁵ She was allowed to return to the department in a different role.²⁰⁶ The department’s doctor considered her to be markedly obese and recommended that she lose weight and retest after six months.²⁰⁷ When she was due to retake the physical test, her personal doctor recommended against it due to her condition; additionally, the doctor recommended an exemption from the test or modification of the test.²⁰⁸ At this point, Morrow went on indefinite sick leave, pending her completion of the test.²⁰⁹ The relevant issue in this case was whether Morrow was a qualified disabled person, a person who could perform the essential functions of a job “with or without reasonable accommodation.”²¹⁰ Morrow stated that her previous job duties were not physically strenuous and her doctor said she was capa-

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 282-83.

¹⁹⁹ *Id.* at 283.

²⁰⁰ *Id.* at 285.

²⁰¹ *Id.* at 283.

²⁰² *Id.*

²⁰³ *Morrow v. City of Jacksonville*, 941 F. Supp. 816, 818 (E.D. Ark. 1996).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 819.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 821 (quoting 42 U.S.C. § 12111(8) (1994)).

ble of performing the job duties.²¹¹ The court found no evidence that Morrow had been significantly limited in any "major life activity" because of her obesity, and that she did not meet the threshold for qualifying as being disabled.²¹²

EEOC v. Texas Bus Lines found that the employer had regarded the petitioner as disabled and thus considered her unable to work, demonstrating a violation of the third ADA prong.²¹³ Petitioner was a morbidly obese woman seeking a bus driver position.²¹⁴ She passed a road test, but failed a required physical examination because the doctor said that her obesity prevented her from being able to move quickly should an emergency arise.²¹⁵ Both parties provided evidence showing that the petitioner was qualified for the job.²¹⁶ The court found that considering the petitioner disabled because of her obesity did not comply with Department of Transportation standards that do not automatically disqualify someone based on obesity.²¹⁷ The court consequently found the petitioner to be "a qualified individual under the ADA."²¹⁸ Additionally, the court found that the employer violated the ADA in discriminating against the petitioner.²¹⁹ *Texas Bus Lines* avoided the difficulties of defining disability because the impairment was severe enough and there was strong evidence that the employer viewed the individual negatively because of obesity.²²⁰

As a trend, many circuits have interpreted obesity to be an impairment under the Rehabilitation Act and the ADA under very limited circumstances.²²¹ The courts seem to have a consensus that for obesity to be a disability, it must first fulfill one of the three elements of the ADA.²²² Using the ADA, most of the cases relied on the first prong to determine that obesity was a physical or mental impairment.²²³ However, using the EEOC guidelines for what constitutes an impairment, the courts decided that there needed to be a physiological basis for the obesity, rather than a non-physiological basis to qualify as an impairment.²²⁴

Although the ADA was meant to cover a broad class of individuals, in cases

²¹¹ *Id.* at 817.

²¹² *Id.* at 822-23.

²¹³ *EEOC v. Texas Bus Lines*, 923 F. Supp. 965, 979 (S.D. Tex. 1996).

²¹⁴ *Id.* at 967.

²¹⁵ *Id.*

²¹⁶ *Id.* at 971.

²¹⁷ *Id.*

²¹⁸ *Id.* at 974.

²¹⁹ *Id.* at 982.

²²⁰ *Theran*, *supra* note 127, at 187.

²²¹ *See, e.g.,* *Murphy v. United Parcel Serv.*, 527 U.S. 516, 525 (1999); *Morrow v. City of Jacksonville*, 941 F. Supp. 816, 823 (E.D. Ark. 1996); *Texas Bus Lines*, 923 F. Supp. at 975-76.

²²² *See* cases cited *supra* note 221.

²²³ *See* cases cited *supra* note 221.

²²⁴ *See* cases cited *supra* note 221.

of obesity, one's obesity could only be classified as an impairment "in rare circumstances."²²⁵ The ADAAA, which is meant to address deficiencies of the ADA, may have a different impact on the designation of obesity as an impairment for disability purposes. As the ADAAA is supposed to make the classification of disability more lenient, obesity's classification as an impairment is possible. Having the ADAAA cover obesity as a disability in more situations would be an appropriate outcome for the courts because obesity can be a considerable impairment in the workplace, but obese individuals still can be capable of performing tasks required in the workplace.

VII. OBESITY UNDER THE ADAAA

Before the ADAAA was enacted, obesity was construed as a physical impairment only where a physiological basis for the person's weight existed.²²⁶ According to the EEOC guidelines, impairment does not involve physical characteristics that are within the "normal" range or that do not have a physiological nature.²²⁷ This guideline illustrates the view that employment practices should only protect obesity when it is not self-inflicted.

Discrimination claims based on obesity have rarely met the burden of proof, unless a physiological link existed.²²⁸ Under the Rehabilitation Act and the ADA, 95.5% of obesity cases have failed.²²⁹ As the ADAAA lowers the threshold for determining disability, obesity employment actions may be more successful. These actions would likely succeed if courts would recognize obesity as a physical impairment. This categorization could likely occur by grouping obesity with major life activities or major bodily functions, or by establishing an easier burden for showing a physiological basis. Such a categorization would ease the burden on plaintiffs because it would link obesity to the important tasks that an individual must perform for everyday functioning. Regarding major bodily functions, a strong argument could be made with respect to obesity's physical effects. In past obesity cases, a physiological basis for the condition was crucial to the success of the claim, but what this consists of has not been clearly defined.²³⁰ A clearer definition that requires more of a correlation to, rather than causation from a physiological condition, may enable plaintiffs to meet their burdens.

²²⁵ 29 C.F.R. pt. 1630 app. § 1630(j) (1998).

²²⁶ See, e.g., *Murphy*, 527 U.S. at 525; see also *Francis v. City of Meriden*, 129 F.3d 281, 285 (2d Cir. 1997).

²²⁷ Regulations to Implement the Equal Employment Provisions of the American with Disabilities Act, 29 C.F.R. § 1630.2(h) (2002).

²²⁸ See Amy L. Allbright, 2007 *Employment Decisions Under the ADA Title I-Survey Update*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 335, 336 (2008).

²²⁹ *Id.*

²³⁰ Regulations to Implement the Equal Employment Provisions of the American with Disabilities Act, 29 C.F.R. § 1630.2(h) (2008).

Under the ADAAA, the bar for establishing a disability is much lower than under the previous acts, as individuals are protected from discrimination solely by having an impairment.²³¹ In past cases, major life activities included work.²³² Some individuals, however, did not meet the standard in cases where the individual's disability seemed to cut off the individual from one specific position rather than most types of work.²³³ As plaintiffs no longer need to demonstrate substantial limitation to prove that they have a disability, obese individuals should not have to show the opportunities foreclosed to them due to the perception of their ability to function in the workplace. Therefore, it would be easier to claim that obesity is a disability.

The EEOC has not released new guidelines regarding definitions or interpretations of key terms in the ADAAA, but this lack of specificity may support the more flexible standard that Congress intended.²³⁴ The key portions of the EEOC guidelines that created difficulty for obese plaintiffs were: the definitions of substantially limiting, the lack of a clear definition of impairment, and the fact that physical impairments required a physiological basis.²³⁵ The ADAAA does not mention whether a physiological basis would require congenital obesity or obesity-related conditions developed over time, such as Type II Diabetes.²³⁶ This distinction matters because changes in metabolic or thyroid functioning that did not previously exist may trigger late onset obesity.²³⁷

Before the enactment of the ADAAA, employers prevailed in a majority of ADA cases because plaintiffs had difficulty proving that their conditions qualified as disabilities.²³⁸ With the ADAAA, obesity litigation will probably increase because of its broader reach in employment discrimination. The overall number of claims may also increase because of the growing number of obese individuals who are unable to find or keep a job, especially in a weak economy where many people are currently unemployed. The rise in unemployment might even result in an influx of *pro se* cases or cases litigated by contingency lawyers.²³⁹ Attorneys may be more willing to now litigate cases under the

²³¹ ADA Amendments Act of 2008, Pub. L. No. 110-325 §2, 122 Stat. 3553, 3553-54 (2009).

²³² See William P. Schurgin, *Disability Discrimination in the 1990s: An Overview of the Employment Provisions of the Americans with Disabilities Act*, 24(9) J. OF HEALTH L., 274 (1991).

²³³ See, e.g., *Murphy v. United Parcel Service*, 527 U.S. 516, 525 (1999); see also *Francis v. City of Meriden*, 129 F.3d 281, 285 (2d Cir. 1997).

²³⁴ See ADA Amendments Act § 2.

²³⁵ 29 C.F.R. § 1630.2 (2008).

²³⁶ *Id.* at § 1630(h).

²³⁷ See *Gene Linked To Adult-Onset Obesity Discovered*, SCIENCE DAILY, June 11, 2008, available at <http://www.sciencedaily.com/releases/2008/06/080610105943.htm>.

²³⁸ See Allbright, *supra* note 228, at 335.

²³⁹ See Allison Torres Burtka, *ADA Amendments Take Effect, Broadening Disability Protections*, 45 TRIAL 14, 16 (2009).

ADAAA, than under the original ADA, because there may be a higher likelihood of winning.²⁴⁰

Though there may be an increase in litigation, this does not prove that a greater percentage of cases for plaintiffs will prevail. Because more individuals may be willing to file suit, there could be a greater chance that many of these cases will not be meritorious. Potential claimants may learn about the increased amount of obesity-related employment discrimination cases, and consequently decide to file a lawsuit on their own behalf, regardless of the strength of their arguments and specific facts. However, it seems likely that a greater number of obesity employment discrimination cases may prevail than in the past, even if the proportion of successful verdicts decreases. A greater number of plaintiffs may be successful because of the more lenient standards for disability and the ADAAA's broader objective of employment discrimination protection. Should a plaintiff be considered impaired by her obesity, which is physical in nature, she would satisfy the first prong of the ADAAA and thus be protected from employment discrimination. Her case would be even stronger if her obesity had any correlation to a physiological condition, though it is not clear what type of basis would be required. Plaintiffs would no longer have to satisfy all three prongs, which lowers their burden of proof. Consequently, at least with regard to protection from employment discrimination, and not access to reasonable accommodations, plaintiffs would more likely succeed under the ADAAA.

Courts will probably examine each case using a strong fact-based inquiry for ADAAA claims because the ADAAA lacks established precedent. Analyzing each case carefully would comport with the ADAAA because it reforms how employment discrimination protects qualified disabled individuals. The ADAAA includes three prongs, similar to the ADA, but because ADAAA does not require all these prongs in order to qualify for protection, previous ADA cases may not have the same outcome as cases with similar fact patterns argued under the ADAAA. Furthermore, obesity plaintiffs will more likely be able to prevail under the "regarded as" category as it begins to receive more attention due to its ability to qualify individuals under the amended act.²⁴¹

Since many current employment discrimination cases are based on incidents that took place before the ADAAA's enactment in 2009, courts will need to consider the differences between deciding a case under the ADA and under the ADAAA. Because the ADAAA does not apply to many existing cases, future cases argued under the ADAAA will carry more weight when courts consider obesity a disability or impairment. Though the diminished requirement of the ADAAA and the relaxed guidelines will likely lead to different results, it is yet to be seen exactly how courts will decide.

²⁴⁰ *Id.*

²⁴¹ See Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 660 (2009).

The ability to participate in employment is important for many adult Americans. If employers continue to discriminate against obese employees and applicants, the number of discrimination incidents and their overall effect will likely increase because of the rising number of obese individuals in the workplace. When discrimination forecloses employment opportunities for a group, public policy should determine how the group can stay in the workforce without fear of discrimination or termination.

The EEOC should release new guidelines that define the ADAAA terms clearly and the guidelines should also indicate whether the specific conditions that are often litigated could be considered disabilities. Because the EEOC regularly releases guidelines and develops policy and enforcement guidance, it is well-equipped to better inform employers about proper conduct.²⁴² Though the courts do not generally defer to the EEOC, developing new and clearer guidelines will provide invaluable advice to employers.²⁴³ Having the EEOC address these concerns would enable those with expertise and experience in employment law and policy to create reasonable standards. This would promote efficiency through a consistent federal interpretation of how different conditions should be evaluated. Additionally, in developing guidelines or rules, the EEOC could seek the feedback of the interested public, experts, and organizations, through notice and comment.²⁴⁴ Because the EEOC occasionally litigates obesity employment discrimination cases, the guidelines also would be a comment on the types of fact patterns and conditions likely to be meritorious. Such activity could help the EEOC develop comprehensive guidelines that educate employers on how to avoid violating the ADAAA and discriminating against applicants and employees.

The EEOC should provide more guidance on finding a definite method of deciding whether obesity constitutes an impairment because courts have not been able to definitively explain when obesity constitutes an impairment. It can be argued that the EEOC wants to give deference to the courts to decide whether obesity is an impairment strictly through a case by case inquiry. However, a federal entity that implements a clearer standard to follow promotes efficiency and consistency. Such a standard would also make the law and the understanding of whether to bring a case more accessible to laypeople. The EEOC previously stated that obesity could rarely be considered a disability, but did not elaborate on what these rare instances were.²⁴⁵ It can be argued that because the EEOC has not yet indicated otherwise as to obesity disability deter-

²⁴² See About EEOC, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Dec. 26, 2010).

²⁴³ See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1939 (2006).

²⁴⁴ Regulations to Implement the Equal Employment Provisions of the American with Disabilities Act, 29 C.F.R. §1630 (2008).

²⁴⁵ *Id.* at § 1630.2(j).

minations, this should be the current standard. Given the ADAAA's goal to expand protections for individuals with disabilities, it seems that the EEOC would also seek similar expansion of coverage. As the success of an employment discrimination claim may depend on how much deference courts grant to EEOC guidelines, having clear terms could be vital to deciding whether to file a complaint.²⁴⁶ Consequently, greater EEOC guidance would increase judicial efficiency by reducing meritless cases while encouraging litigation of strong cases, and would also reduce costs to the EEOC, which may have fewer meritless cases to investigate.

Courts should find a way of using consistent factors to determine whether obesity qualifies as an impairment. Such congruence among the courts, if developed after a Supreme Court case or EEOC guidelines, would facilitate case adjudication such that similar fact patterns would reach similar results in different circuits. This would also increase efficiency as judges would not need to expend time and resources deciding on circuit splits in addition to reviewing previous rulings. Although different circuits need not follow the reasoning or decisions of other circuits, similar decision-making processes or considerations would streamline case decisions to comport more with the ADAAA's intent for employment discrimination protections.

Furthermore, courts, as well as the healthcare system, should determine a way to differentiate between self-inflicted obesity cases and cases rooted in different disorders such as health problems, including metabolic dysfunction, or resulting from other injuries. Although none of the disability statutes mentioned the manner in which an impairment develops, cases in which individuals become obese due to self-control or voluntary reasons should probably not prevail. While the ADAAA covers disabled individuals, it does not seem to include individuals whose disability is self-inflicted. This distinction would ensure that cases involving functional obese individuals could reach a favorable result for the plaintiff, while reinforcing the notion that those who do have control over their weight should not receive the same protections. As a policy consideration, distinguishing between causes for obesity would also encourage the public to understand that obesity is not necessarily controllable for some individuals, and that others should monitor their health and make efforts to stay healthy. This perspective might remove the negative perception of obese people as being lazy through the visibility that many obese individuals cannot control their condition. It would also promote healthy living for those whose obesity is not rooted in a physical impairment.

As obesity becomes an increasingly severe problem for our nation's workforce, more individuals will fall into this weight classification both through genetic and self-determined mechanisms. With the number of obese

²⁴⁶ See Ann Hendrix and Josh Buck, Comment, *Employer-Sponsored Wellness Programs: Should Your Employer Be the Boss of More than Your Work*, 38 SW. L. REV. 465, 480 (2009).

individuals continuously rising, the physiological causes of obesity may be an important distinction both in litigation and in public perception. This distinction could minimize the broad, negative stereotype placed upon obese individuals by demonstrating that a portion of obese people are not in their physical state due to their own conduct. By making this distinction, employers may be better able to distinguish between obesity that impairs a person's job performance or energy and strength levels, from obesity that is genetic, but does not prevent full productivity as a member of the workforce. This distinction is important because it demonstrates what jobs a person is limited to and what tasks he can perform.

Employment discrimination protection is essential to our workforce and to our economy; however, defining obesity as a disability under the ADAAA could come at the price of negatively stigmatizing the condition. Obese individuals could receive protection in the workplace, although society could view the condition unfavorably because of the label attached to it. At this point, it does not seem as though obesity could gain protections from avenues other than the ADAAA, unless more jurisdictions adopt weight anti-discrimination laws. Being afforded protection from discrimination would be a victory for obese individuals and currently the best way to attain such protections nationwide in a consistent manner is through the ADAAA. Protecting our nation's workers is of strong importance and taking strides on a nationwide level is the best way to create precedent in the courts enforcing the right to work.

VIII. CONCLUSION

The ADAAA expanded disability protections in the employment setting by lowering the requirements for protection and for reasonable accommodations, and will lessen the amount of future litigation regarding these concerns due to clearer standards. The lack of a federal definition for impairment, however, will lead to difficulties finding a clear rule for what counts as an impairment, which is the crux around which all the ADAAA prongs revolve. The ADAAA, congressional intent, and policy concerns lead to a more liberal construing of impairment, but discussion in the courts regarding different fact patterns and whether certain individuals should be considered disabled—and therefore subject to the protections of the federal statute—will continue.

Past case law has not considered obese individuals as disabled or obesity as an impairment for ADA purposes. However, the ADAAA expands protection from employment discrimination and will likely lead to the classification of obesity, particularly morbid obesity, as an impairment. The EEOC's clarifications will shed light on how courts will treat obesity.